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February 3, 1998

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, N.W. – Room 222
Washington, D.C. 20554

Re: Erratum -- CC Docket No. 97-208, BellSouth Application To Provide In-Region, InterLATA Service in South Carolina

Dear Ms. Salas:

This letter corrects a single error in AT&T Corp.'s petition for reconsideration in the above-captioned proceeding, which was filed on February 2, 1998. The document filed with the Commission includes a placeholder in footnote 10, on page 14, which reads "[Cite to Reply Comments]." The correct text of footnote 10 should read, in full, "See AT&T Reply Comments, pp. 35-36."

Twelve corrected copies of AT&T's petition are being filed with this letter. The only change that has been made to these documents is the substitution of the corrected text of footnote 10.

Sincerely,

James H. Bolin, Jr./ha

James H. Bolin, Jr.

cc: A. Richard Metzger
Melissa Newman
Michael Pryor
Jordan Goldstein
Jake Jennings

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by BellSouth Corporation,	)	
et al. Pursuant to Section 271 of the	)	CC Docket No. 97-208
Communications Act of 1934, as amended,	)	
To Provide In-Region, InterLATA Service	)	
In South Carolina	)	

PETITION OF AT&T CORP. FOR RECONSIDERATION

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February 2, 1998

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SUMMARY

AT&T seeks reconsideration of the Commission's order in this proceeding in one respect: The BellSouth Order abandoned the Commission's prior, well-considered interpretations of sections 251(g) and 272(g), and approved BellSouth's proposal to use a marketing script for inbound calls requesting new service that recommended its affiliate's interLATA service over that of competing IXCs. The BellSouth Order failed to provide an adequate basis for this radical reinterpretation of the 1996 Act, or to consider alternatives that would have preserved the essential requirements of equal access. Moreover, the Commission simply ignored its ruling in the Ameritech Order that the use of such a discriminatory script would be "inconsistent on its face" with section 251(g), and would permit a BOC "to gain an unfair advantage over other interexchange carriers."

Even apart from these procedural failings, the Commission's abrupt revision of its reading of the 1996 Act cannot be squared with the requirements of that statute. As the Commission's prior orders interpreting section 272(g) make plain, that section in no way limits or conditions the BOCs' obligations pursuant to section 251(g) to continue to comply with the equal access regime. Indeed, the fundamental purpose of equal access -- to limit the BOCs' ability to leverage their market power arising from their bottleneck control of local exchange facilities -- applies with full force to BOC interLATA affiliates. Although the Commission sought to justify the BellSouth Order's 180-degree change in its reading of sections 251(g) and 272(g) by arguing that it was merely recalibrating a "balance" between those provisions which it had struck in its prior decisions, the issue is not simply one of "balancing" two statutory priorities, but of interpreting section 272(g) in a manner that gives full effect to the unequivocal mandate of section 251(g).

Finally, the BellSouth Order errs by purporting to change the equal access requirements without issuing regulations to replace them. The plain language of section 251(g) provides that the existing equal access regime continues to apply "until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission...." Although an agency ordinarily has significant discretion to proceed by rulemaking or adjudication, the plain language of section 251(g) mandates that the Commission issue regulations if it seeks to amend the existing equal access requirements.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by BellSouth Corporation,	)	
et al. Pursuant to Section 271 of the	)	CC Docket No. 97-208
Communications Act of 1934, as amended,	)	
To Provide In-Region, InterLATA Service	)	
In South Carolina	)	

PETITION OF AT&T CORP. FOR RECONSIDERATION

Pursuant to Section 1.429 of the Commission's Rules, AT&T Corp. ("AT&T") hereby petitions the Commission to reconsider its order in this proceeding ("BellSouth Order")[1] in one respect: The BellSouth Order abandoned the Commission's prior, well-considered interpretation of § 272(g)'s "joint marketing" provisions, rejecting the conclusions adopted a mere four months earlier in the Ameritech Order[2] by approving BellSouth's proposal to use a marketing script for inbound calls requesting new service that recommended its affiliate's interLATA service over that of competing IXCs. The Commission's abrupt repudiation of its prior rulings is without an adequate reasoned basis, and cannot be squared with the requirements of the 1996 Act.

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1 Memorandum Opinion and Order, Application of BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In South Carolina, FCC 97-418, CC Docket No. 97-208, released December 24, 1997 ("BellSouth Order").

2 Memorandum Opinion and Order, Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan, FCC 97-298, CC Docket No. 97-137, released August 19, 1997 ("Ameritech Order").

I. THE COMMISSION HAS NOT ADEQUATELY JUSTIFIED, AND CANNOT JUSTIFY, THE BELLSOUTH ORDER'S COMPLETE REVERSAL OF ITS PRIOR INTERPRETATION OF SECTIONS 251(g) AND 272(g).

A. The Commission's Prior Decisions Correctly Determined That Section 251(g) Mandates That BOCs Continue To Comply With The Equal Access Regime When Engaging In Joint Marketing On Inbound Calls For New Service.

The Commission addressed the scope of the BOCs' joint marketing authority in two rulings issued prior to the BellSouth Order: its Non-Accounting Safeguards[3] and Ameritech Orders. Each of these prior decisions considered the implementation of section 272(g)'s joint marketing provisions in light of the equal access requirements mandated by section 251(g), and each reached conclusions which are diametrically opposed to those in the BellSouth Order.

It is well-settled that an agency that seeks to change its interpretation of the law, as the Commission did in the BellSouth Order, must "provid[e] cogent reasons for doing so," "confront[ing] the issue squarely and explain[ing] why the departure is reasonable." Central State Motor Freight Bureau, Inc. v. I.C.C., 924 F.2d 1099, 1109 (D.C. Cir. 1991); Davila-Gardales v. INS, 27 F.3d 1, 5 (1st Cir. 1994); see also Advanced Micro Devices v. CAB, 742 F.2d 1520, 1542 (D.C. Cir. 1984) ("[A]n agency changing its course must supply a reasoned analysis that prior policies and standards are being deliberately changed, not casually ignored."); Citizens Awareness Network, Inc. v. NRC, 59 F.3d 284, 290 (1st Cir. 1995) (An agency changing its course must . . . supply a reasoned analysis for the change."). The BellSouth Order fails to provide an adequate, reasoned basis for rejecting the Commission's prior interpretation of the 1996 Act.

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[3] First Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, FCC 96-489, CC Docket No. 96-149, released December 24, 1996 ("Non-Accounting Safeguards Order").

The Non-Accounting Safeguards Order was the Commission's first explication of sections 251(g) and 272(g). That order confirmed that by enacting section 251(g), Congress intended to maintain the equal access regime as it existed prior to enactment of the 1996 Act. Accordingly, the Commission ruled that the "BOCs must continue to inform new local exchange customers of their right to select the interLATA carrier of their choice and take the customer's order for the interLATA carrier the customer selects." Non-Accounting Safeguards Order ¶ 292. The order explained that "[t]he obligation to continue to provide such nondiscriminatory treatment stems from section 251(g) of the Act, because we have not adopted any regulations to supersede these existing requirements." Id. The Commission thus specified that "BOCs must provide any customer who orders new local exchange service with the names . . . of all of the carriers offering interexchange service in its service area," and "[a]s part of this requirement, a BOC must ensure that the names of the interexchange carriers are provided in random order." Id.

The Non-Accounting Safeguards Order also considered the interaction of the equal access requirements with section 272(g)'s authorization of certain joint marketing activities. In this regard, the order confirmed that continued application of the equal access requirements is not inconsistent with the BOCs' joint marketing authority.[4] Indeed, Congress' decision to include section 251(g) in the Act makes plain that whatever powers section 272(g) may confer on the BOCs, that provision was not intended to modify the equal access regime.

The Commission reiterated and reinforced its interpretation of the Act in the Ameritech Order. That order unequivocally held that section 251(g) prohibited Ameritech from

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[4] See id., ¶ 292 ("[T]he continuing obligation to advise new customers of other interLATA options is not incompatible with the BOCs' right to market and sell services of their section 272 affiliates under section 272(g).").

steering inbound calls for new local service toward its long-distance affiliate at the outset of the presubscription process. Ameritech proposed to use the following script:

> You have a choice of companies, including Ameritech Long Distance, for long distance service. Would you like me to read from a list of other available long distance companies or do you know which company you would like?

Ameritech Order ¶ 375. The Commission concluded "that this script, if actually used by Ameritech, would violate the 'equal access' requirements of section 251(g)." Id. The Ameritech Order specifically observed that the Non-Accounting Safeguards Order ruled that the BOCs have a continuing obligation to provide nondiscriminatory treatment to IXCs during inbound calls for new service, and that the BOCs therefore were required to provide callers with a randomized list of available IXCs. Id. The Commission accordingly rejected Ameritech's proposed marketing script, finding that "[m]entioning only Ameritech Long Distance unless the customer affirmatively requests the names of other interexchange carriers is inconsistent on its face with our requirement that a BOC must provide the names of interexchange carriers in random order." Id. (emphasis added). The Commission further held that the Ameritech's use of the proposed script "would allow Ameritech Long Distance to gain an unfair advantage over other interexchange carriers." Id. Thus, the Ameritech Order, building upon the conclusions of the Non-Accounting Safeguards Order that preceded it, expressly held that section 251(g) precludes a BOC from short-circuiting equal access requirements by endorsing its affiliate's interLATA service at the outset of the presubscription process.

B. The BellSouth Order Does Not Provide A Reasoned Basis For Abandoning The Commission's Prior Interpretation Of The Act

The BellSouth Order summarily abandons the interpretation of sections 251(g) and 272(g) that the Commission advanced in the Non-Accounting Safeguards Order and the

Ameritech Order, explaining its abrupt reversal of course in just two short paragraphs. See BellSouth Order ¶¶ 238-39. Indeed, the joint marketing script BellSouth proposed in its section 271 application for South Carolina was facially noncompliant with the Commission's prior rulings, including the just-issued Ameritech Order -- the parties commenting on that application had no notice that the Commission was prepared even to consider such a drastic change in its policy. The Commission bears a heavy burden to justify its changed position, a burden it failed to shoulder in the BellSouth Order.

BellSouth's application for interLATA authority proposed to use the following marketing script on inbound calls for new service:

> You have many companies to choose from to provide your long distance service. I can read from a list the companies available for selection, however, I'd like to recommend BellSouth Long Distance.

BellSouth Order ¶ 233. Had the Commission adhered to its prior interpretation of the Act, it plainly would have been required to reject this script as inconsistent with section 251(g). Indeed, the BellSouth script was a more egregious violation of that provision than was Ameritech's, because BellSouth proposed to expressly recommend BellSouth Long Distance over other IXCs, and to subtly discourage customers from taking the time to listen to a list of available IXCs. Nevertheless, the Commission approved the use of the proposed script, repudiating its considered analysis in the Ameritech and Non-Accounting Safeguards Orders.

The BellSouth Order seeks to rest its holding on the Non-Accounting Safeguards Order's finding that "a BOC may market its affiliate's interLATA services to inbound callers, provided that the BOC also informs such customers of their right to select the interLATA carrier of their choice." Non-Accounting Safeguards Order ¶ 292. However, the Ameritech Order considered the ruling as well, and concluded that section 272(g) does not permit a BOC to market

its affiliate's interLATA services unless and until it complies with section 251(g)'s equal access requirements by neutrally presenting the available IXCs. In light of this prior interpretation, the Commission may not now simply aver that the Non-Accounting Safeguards Order represents sufficient grounds for its decision.

Nor does the BellSouth's Order's mention of the Non-Accounting Safeguards Order's bare citation of a NYNEX ex parte support the Commission's revised views of the Act. See BellSouth Order ¶ 239. As a preliminary matter, whatever limited meaning might otherwise be attributed to an unelaborated reference to an ex parte filing, the Ameritech Order also considered the Non-Accounting Safeguards Order, and flatly rejected the claim that a BOC could permissibly use a marketing script that was, if anything, less discriminatory than BellSouth's proposal. The Ameritech Order thus underscores what the context of the Non-Accounting Safeguards Order makes plain: The Commission cited the NYNEX ex parte only for the proposition that a BOC properly could engage in some marketing of its affiliate's interLATA service during inbound calls. Non-Accounting Safeguards Order ¶ 292. The Commission did not quote any portion of the ex parte submission, or otherwise suggest that it was approving or disapproving any particular marketing script. Indeed, the Non-Accounting Safeguards Order specifically declined, at the BOCs' urging, to adopt regulations regulating marketing practices under section 272(g). Id. ¶ 291.

At bottom, the BellSouth Order's repudiation of the Commission's prior legal interpretations is based only on the unexplained assertion that the Ameritech Order reached the wrong "balance" between the equal access requirements and the BOCs' joint marketing authority.[5]

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[5] The Commission also notes in support of its decision that section 272(g) does not contain "any exception for inbound calls or calls from new customers." BellSouth Order ¶ 239. No significance can be attributed to this fact, however, since section 251(g)'s mandate

This statement is simply an acknowledgment that the Commission has now "changed its mind," not a reasoned explanation, and plainly is inadequate to justify the significant policy shift worked by the BellSouth Order. See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983) ("the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.") (quotation omitted).

C. The BellSouth Order's Interpretation Of Sections 251(g) and 272(g) Cannot Be Justified On Legal Or Policy Grounds

To justify the 180-degree change in its reading of sections 251(g) and 272(g), the Commission purported to rely on the Non-Accounting Safeguards Order, arguing that it was merely recalibrating a "balance" between those provisions which it had struck in its prior decisions. BellSouth Order ¶ 238. To the contrary, however, the issue is not simply one of "balancing" two statutory priorities, but of interpreting section 272(g) in a manner that gives full effect to the requirements of section 251(g) and the policies underlying it. The Non-Accounting Safeguards Order unequivocally held that section 251(g) preserves the same equal access requirements that applied prior to passage of the 1996 Act. Non-Accounting Safeguards Order ¶ 292. Indeed, that order makes plain the Commission's conclusion that section 272(g)'s joint marketing provisions did not work any change in the equal access requirements, finding that the

(..continued)

> regarding the equal access requirements similarly contains no exception that would exclude from its coverage a BOC's marketing efforts on behalf of its affiliate. Moreover, in light of the fact that section 272(g) is styled as a bar to BOC marketing efforts before interLATA authority is granted, rather than as an affirmative grant of such marketing authority after interLATA approval, it simply would make no sense for there to have been an express "exception" that precluded marketing practices that were in conflict with the equal access requirements.

"continuing obligation" to follow these requirements "is not incompatible" with the BOCs' joint marketing authority under that section. Id.

First, as a legal matter, the Commission's decision is at odds with section 251(g), which expressly preserves the equal access regime. The marketing script approved in the BellSouth Order recommends BellSouth Long Distance at its outset, then makes passing reference to the availability of other, unnamed, IXCs. Such a script plainly violates the fundamental equal access requirement that one IXC not be favored over another in the presubscription process.

Section 272(g)(2) provides that a BOC "may not market or sell interLATA service provided by an affiliate" until the affiliate is authorized to provide interLATA service. By negative implication, a BOC may engage in certain marketing activities once it obtains interLATA authority. See Non-Accounting Safeguards Order ¶ 291. Section 272(g), however, does not even refer to -- much less limit or displace -- a BOC's equal access obligations pursuant to section 251(g). It is simply untenable to assume that Congress would, in section 251(g), specifically and broadly continue each and every equal access requirement, whether created by "court order, consent decree, or regulation, order or policy of the Commission," and then partially repeal these obligations by implication in section 272(g).

Moreover, the BellSouth Order fails to even consider the Ameritech Order's ruling that to permit a BOC to market its affiliate's interLATA services before complying with its equal access obligations would give the affiliate "an unfair advantage over other interexchange carriers," Ameritech Order ¶ 376. Preventing such "unfair advantage" is the primary rationale for the equal access requirements, which seek to limit the BOCs' ability to leverage their market power arising from their bottleneck control of local exchange facilities into interexchange markets. This

longstanding rationale for equal access applies with full force to BOC interLATA affiliates. Virtually all local exchange customers currently have no choice but to obtain service from their incumbent LEC, and are unlikely to be able to choose an alternative provider of local telephone service in the near future. Further, as a result of the BOCs historic, legally protected monopoly, customers in need of new local service can be expected in many cases simply to call "the phone company"-- their incumbent LEC -- by default, even as local competition begins to develop. Absent the protections of equal access, BOCs will have both the incentive and the opportunity to abuse their position as monopoly providers of local exchange service to steer callers for new service toward their affiliates' interLATA services. Such a practice would give a BOC affiliate a significant -- and potentially insuperable -- advantage, an advantage unrelated to the quality and price of its services.[6]

Contrary to the claims of some BOCs, the principles established in the Non-Accounting Safeguards Order and the Ameritech Order do not unreasonably or unfairly limit their ability to market their affiliates' services. The equal access requirements merely serve to limit BOCs' ability to steer what are essentially captive customers to their affiliates on inbound calls requesting new service. Even if the BOCs are prohibited from recommending their affiliates' services at the outset of the presubscription process, the affiliates nevertheless would enjoy a powerful and unique advantage. No other IXC will have the opportunity to deliver marketing messages to customers that call the BOC to order new service. The value to a section 272 affiliate of owning the exclusive right to market on inbound calls for new service to its monopolist

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[6] The fact that a BOC may "contemporaneously" state that "other carriers also provide long distance service and offers to read a list of [them]," BellSouth Order ¶ 237, does not cure the equal access violation any more than if a BOC currently recommended AT&T interLATA service, but offered to read a list of other available IXCs.

sibling will be immense, even if it follows equal access disclosures. Further, although some BOCs have asserted that requiring them to comply with the plain language of Section 251(g) would somehow "nullify" Section 272(g), it is beyond cavil that to permit marketing of any kind relating to interexchange services on inbound calls would grant BOCs a valuable and significant power that they have heretofore never possessed.

Any concern that it is somehow unfair to subject the BOCs to the equal access regime while competing local exchange carriers do not face the same restrictions is unfounded. Every call to request service from a CLEC confirms that competition is working, that the customer is aware of his or her choices, and that the customer is exercising choice. A call to the BOC for local service provides no such assurances. To the contrary, calls to the BOC for local service may well be the result of a failure of local competition, including discrimination against competitors that has made their services unattractive to consumers. As a result, it is completely reasonable to require, as the Act does, that BOCs, before leveraging in-bound calls for local service into marketing opportunities for their interLATA affiliates, first make statements in compliance with the equal access requirements.

D. The BellSouth Order Fails To Evaluate Reasonable Alternatives That Would Preserve Equal Access While Providing BOCs The Authority To Market During In-bound Calls For New Service

The BellSouth Order fails even to consider reasonable alternatives to the marketing proposal presented by BellSouth -- alternatives that would preserve equal access requirements, as required by section 251(g), while permitting BOCs to market their affiliates' interLATA services during inbound calls for new service. Cf., e.g., Professional Pilots Federation v. F.A.A., 118 F.3d 758, 763 (D.C. Cir. 1997) (Agency must "demonstrate that it afforded adequate consideration to every reasonable alternative presented by its consideration.")

One such alternative -- originally mandated by the Ameritech Order -- would be to allow marketing on inbound calls for new service only after the BOC has first complied with the equal access requirements by neutrally informing callers of the available IXCs. Specifically, the BOC could begin by asking if callers had decided on a long-distance carrier. If the caller indicates that he has not yet decided on an IXC, then the BOC -- before engaging in any marketing efforts -- would proceed, as it does now, with some form of neutral, randomized listing of available IXCs. Contrary to claims made previously by BellSouth and Ameritech,[7] such a list would not have to be exhaustive in order to comply with the equal access requirements. Instead, all that is required is that the BOC select a method that does not discriminate in favor of or against a particular IXC.[8] If the customer makes a selection after hearing this neutral, randomized listing, then the BOC would not be permitted to badger the customer to change his or her mind, as such aggressive tactics could lead callers to believe that they must choose the BOC's affiliate as an IXC in order to forestall delay or mishandling of their local service requests. If, however, a customer expressed

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7 Ameritech Comments at 14-15; BellSouth Comments at 64.

8 AT&T is not aware of a single BOC that currently feels compelled by equal access requirements to list each of every available IXC before accepting an IXC selection from a customer. Instead, different BOCs meet the nondiscrimination requirement in different ways, with some reading substantially truncated lists of available IXCs, which lists regularly change, and others reading from a list of all IXCs but allowing the customer to interrupt at any time with a selection. It is AT&T's understanding that BellSouth and Ameritech provide information regarding available IXCs only when asked for this information by customers, and provide such information by reading from a randomized list of all IXCs until the customers indicate their selection. See, e.g., BellSouth Telephone Companies Tariff F.C.C. No. 4, Transmittal No. 351, 6 FCC Rcd. 1592, released March 7, 1991 (approving BellSouth tariff that provided that, for 0- callers who have no preference for an IXC, the BellSouth operator "will read a list of subscribing [IXCs] from which the caller may choose. . . . The order of the names on the list would be changed monthly, with subscribers rotating up in order."); Ameritech Operating Companies Petition for Waiver of Section 69.4(b) of the Commission's Rules, Transmittal Nos. 425, 467, 6 FCC Rcd. 1541 ¶ 5, released March 5 1991 (approving Ameritech tariff that described a method for reciting random lists of IXCs for 0- callers)

uncertainty over which IXC to select after hearing a listing, or declined to hear the listing, then the BOC could ask customers whether they would like to hear about its affiliate's interLATA service.

In another scenario, recently adopted by a California ALJ,[9] if a customer expressed an interest in hearing about the affiliate's interLATA service, then his call would be transferred to a special marketing group within the BOC, separate and apart from the customer service representatives responsible for taking new service calls. Separating the marketing of the affiliate's services in this fashion would reduce the risk that BOC representatives would engage in unfair marketing practices, including the discriminatory use of CPNI, and would aid in identifying the costs of such activities so as to deter subsidization of the affiliate.

Alternatively, the Commission could require that BOCs postpone their marketing efforts during inbound calls until after they have advised customers they have a choice of IXCs for long-distance service, and have asked customers whether they have selected an IXC. If at this point the customer selects a particular IXC, then no marketing would be permitted. This modest practice would impose no added burdens on BOCs, and would preserve the equal access obligations by requiring that the initial customer interaction not favor a particular IXC .

Each of these options -- unlike the marketing plan approved in the BellSouth Order -- would require the BOCs to comply with section 251(g) by offering customers a neutral, nondiscriminatory presentation of their IXC choices before marketing their affiliates' services.

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[9] Application of Pacific Bell Communications for a Certificate of Public Convenience and Necessity to Provide InterLATA, IntraLATA and Local Exchange Telecommunications Service Within the State of California, Calif. PUC, A.96-03-007, at 36-41 (May 5, 1997) (ALJ decision).

Yet the Commission did not consider any of these alternatives in evaluating BellSouth's section 271 application for South Carolina.

II. UNDER THE PLAIN LANGUAGE OF THE ACT, THE ONLY PERMISSIBLE MEANS TO CHANGE THE EQUAL ACCESS REQUIREMENTS IS BY ISSUING REGULATIONS TO SUPERSEDE THE EXISTING REQUIREMENTS

Finally, the BellSouth Order errs by purporting to change the equal access requirements without issuing regulations to replace them. The plain language of section 251(g) provides that the existing equal access requirements continue to apply "until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment." (emphasis added). The Commission recognized this requirement in the Non-Accounting Safeguards Order, finding that "[t]he obligation to continue to provide such nondiscriminatory treatment stems from section 251(g) of the Act, because we have not adopted any regulations to supersede these existing requirements." Non-Accounting Safeguards Order ¶ 292.

Although an agency ordinarily has significant discretion to proceed by rulemaking or adjudication, see, e.g., SEC v. Chenery, 332 U.S. 194, 202-03 (1947), the plain language of section 251(g) mandates that the Commission issue regulations if it seeks to amend the existing equal access requirements. Interpreting a similar statutory command, the Second Circuit found that a requirement that state claims for certain Medicaid reimbursements must be "in such form and manner as the Secretary [of HHS] shall by regulation prescribe" required that agency to proceed by rulemaking. Perales v. Sullivan, 948 F.2d 1348, 1356 (2d Cir. 1991). The court held that, although the procedures HHS sought to impose might well be reasonable,

> The statutory mandate "shall by regulation" instructs the Secretary how to implement the statute: he must validly promulgate regulations governing the form and manner of claims for reimbursement.

Id. at 1356. Similarly, section 251(g) expressly preserves the equal access regime until the Commission alters it "by regulations." Indeed, any other reading of section 251(g) would render the phrase "until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission" mere surplusage. Cf., e.g., Pennsylvania Public Welfare Dept. v. Davenport, 495 U.S. 552, 562 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.").

Section 251(g) requires that amendments to equal access requirements be imposed through a rulemaking proceeding that promulgates regulations, not through an adjudicatory proceeding such as review of a section 271 application. Because the BellSouth marketing script approved in the BellSouth Order would indisputably have violated the equal access regime as it existed on February 7, 1996, it now would violate section 251(g) and is therefore impermissible. This issue, although raised by AT&T in its comments on the BellSouth application,[10] was not addressed in the BellSouth Order. Cf., e.g., Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43 ("an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem").

[10] See AT&T Reply Comments, pp. 35-36.

CONCLUSION

For the foregoing reasons, the Commission should reconsider the BellSouth Order and hold the joint marketing script proposed by BellSouth to be contrary to the Act.

Respectfully submitted,

By _____

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